Privy Council Appeal No. 135 *of* 1931.

Karapaya Servai and others - - - - - - - *Appellants*

v.

Mayandi - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1933.

Present at the Hearing:

LORD MACMILLAN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The question for determination in this appeal is as to the respondent's right to share in the estate of one Karapaya Servai, a Madrassi Hindu, who seems to have acquired a considerable fortune in Burma. He died a lunatic in 1923. The respondent is the son of Karapayi (or Karupi), who is now admitted to have been the first wife of Karapaya, and the defence to his claim is a denial of his paternity. The appellants are two minor sons of Karapaya by his second wife, Nachiamma, and one Chellaya, a brother of Nachiamma, who had been appointed guardian in the lunacy, and was at the date of the suit in effective possession of the estate.

The suit was instituted by the respondent in the District Court of Pyapon, and the main issue formulated for decision was, "Is the plaintiff the son of the deceased lunatic Karapaya, begotten in lawful wedlock with Karapayi?" The District Judge answered this question in the negative and dismissed the

suit. The High Court on appeal took the opposite view, declaring the respondent's legitimacy and giving him a decree for a third share of the estate.

It is common ground that the case is governed by Section 112 of the Indian Evidence Act (I of 1872), which is in the following terms :—

> " The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The validity of the marriage between Karapaya and Karapayi was at first disputed—most unnecessarily, as their Lordships think—but was subsequently admitted, and there being no suggestion that it was afterwards dissolved, the only question is whether it has been shown that Karapaya and Karapayi had no access to each other at any time when the respondent *could have been* begotten. The burden of showing this was, in their Lordships' opinion, rightly laid on the appellants.

It was suggested by Counsel for the appellants that " access " in the section implied actual cohabitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse.

There can be no doubt that in December, 1911, the parties came together after having lived separate for a considerable time. Karapaya was settled at Tamangyo in the Pyapon District with his second wife : Karapayi had been living in the Moulmein District, where her mother and brother resided. What exactly took place is uncertain, but it is admitted that she came to Tamangyo, where she was refused admission to the house in which her husband and Nachiamma were living, and put up with one Viyani Maistry, a relative of Karapaya, in a neighbouring village. On the 24th December, 1911, an agreement in writing (a copy of which was put in at the trial by the appellants as Exhibit 14) was come to between them in the following terms :—

> " This agreement is written and given on 9th *Margali* of *Vecrothukeruthu* by Mawana Kunna Runa Karappiah Servai residing at Tamangyo in Pyapon Township in favour of his wife Karuppayi that the profit produced by cultivating his share of paddy field named Marutha Kammu China Aroken, Savari Muthu may be given to her Suna Pana Vellai Thever must look after my share by providing her the profit produced thereon in my share. If she had no money for expense let her write to me."

The document is signed by the husband and verified by the village headman of Tamangyo. He was examined on commission at the instance of the appellants and deposed to its execution, but his memory was obviously failing and his evidence carries the story no further.

The materiality of these facts, however, is that in December, 1911, the parties were admittedly in touch with each other, were residing at all events for a short period in reasonable proximity, the wife being in the house of a relative of the husband, and that there is nothing in the agreement to suggest that she was unfaithful or that the parties were on terms of personal hostility, though no doubt the presence of the second wife would make an open reconciliation difficult.

If, therefore, the respondent could have been begotten during this period his legitimacy was undeniable. It seems to follow that the date of his birth was the most important question in the case. It might have been expected under these circumstances that the appellants would have put this at some time outside the possibility with which they were faced having regard to the episode of December, 1911. But this was not so—rather the contrary. For they seem to have pinned their faith throughout to a birth in August of the following year, which might well be almost fatal to their defence.

It appears that in 1915 Karapayi again descended upon her husband and the second wife at Tamangyo—this time accompanied by her son—and took proceedings under the Criminal Procedure Code for maintenance. She filed a petition in this behalf in the District Magistrate's Court at Pyapon, in which she stated that the respondent was conceived at the time of separation and was born on the 20th August, 1912, and supported the particular date by an official birth return. This petition, or, rather, a copy of it, as the original file had been destroyed, was put in evidence at the trial by the appellants, being their Exhibit No. 13. Karapayi was called as a witness for the respondent, and was cross-examined at great length by very experienced Counsel who appeared for the appellants; but no question was put to her suggesting that the 20th August, 1912, was not the true date of the respondent's birth. It may be assumed, therefore, that birth on this date was part of the appellants' case. In the Court of Appeal they seem to have gone even further, as the learned Chief Justice, by whom the judgment of the Court was delivered, says, "the admissibility and truth of the statement of Karapayi that on the 24th December, 1911, she was with child was not challenged before us": and he was evidently under the impression that this had also been the appellants' attitude in the trial Court.

However this may be, the appellants had manifestly set up against themselves a case which it was very difficult for them to refute. They no doubt were able to throw a cloud of suspicion upon the moral conduct of Karapayi after 1911, but they made no attempt to prove the one fact that was vital to their defence, viz., non-access in or about December of that year.

Apart from the headman, whose evidence has already been referred to, and who merely proved the 1911 agreement, the only

witnesses examined by the appellants who could give evidence as to what happened in December, 1911, were Chellaya, Nachiamma and one Kawana Kali Mutu, who professed to have been a life-long friend of Karapaya. The material parts of their depositions were as follows :—

Chellaya (in chief) :—

" Karapaya, Nachi Ama and I came back to Burma after having stayed for one year in India. Then I took an employment in the Chetty's house, S.K.R.S.K.R. Firm at Kyethpamwezaung. Karapaya and Nachi Ama lived at Tamangyo and lived there for two years. Tamangyo is about a mile distant from Kyethpamwezaung. At that time I did not see Karapayi there. I worked in the Chetty's house for about five years. I saw Karapayi only when she reported to U Maung, the headman. Karapayi reported that she had been driven out of the house and she did not get proper maintenance. She asked the headman to request Karapaya to take her back and she promised that she would live with him properly. A *Panchayat* was held over that matter. Karapaya then signed an agreement. (*Note.*— The translation of the agreement is filed as Exhibit 14.) Rs. 100 or Rs. 110 was given to Katapayi for the expenses to go back to India and to live with Karapaya's mother at Uttantun."

(In cross-examination) :—

" Karapayi made a report to the headman. After receipt of her report, the headman summoned Karapaya. Karapayi said at that time that she would live in Karapaya's house without running away to another house if she was to have her maintenance in his house. He did not like to have Karapayi in his house. When he was requested by the elders to keep her in the house, he said that he agreed to send her back to India."

Nachiamma (in chief) :—

" I did not see Karapayi up to that time, in Burma. I remember about the agreement which my husband made with Karapayi about the maintenance. This agreement was given at the *panchayat* at Kyethpamwezaung. I did not see Karapayi at that time but I heard that she was putting up in Viyanna Maistry's house. My husband told me that he had given about Rs. 100 to Karapayi to go back to India, and live in her mother-in-law's house, *i.e.* Karapaya's mother's house. Karapayi had never lived in a house with me and Karapaya. It is not true that I, Karapaya and Karapayi lived in one house and that I and Karapaya drove her out before the *panchayat*."

Kawana Kali Mutu (in chief) :—

" Karapaya sent for me to be present at the *panchayat* but I did not go there and I do not know in whose house the *panchayat* was held. He requested me to be present at the *panchayat* to be held in the headman's house at Kyethpamwezaung. I was too busy then and could not go as requested. I did not see Karapayi at that time. I asked Karapaya later if the *panchayat* was over. Karapaya said that she promised to him to live properly and he therefore agreed to take her back but she must not remain in Burma and must go back to India. He further said that he had executed an agreement and so she might go and live in his mother's house."

It would, their Lordships think, be quite impossible for any Court to hold on this evidence that the appellants had proved non-access in December, 1911. The one person who might have been able to give useful evidence on this question was Viyani

Maistry, in whose house Karapayi was staying at the time, but he was not examined.

It seems probable, however, that what the appellants really relied upon in proof of their case was the effect of certain other documents which are upon the record, and to which reference is made in the judgment of the trial Judge.

The first of these is a written statement filed by Karapaya in the maintenance case of 1915. In it he denies the paternity of the respondent, and charges that Karapayi had been living in adultery for many years at Moulmein with one Nachiappa. He, however, says that he did not know of this " until about three years ago." This document was put in evidence, apparently without objection, by the appellants, and seems to have been relied on by the trial Judge. The High Court held that it was inadmissible. In their Lordships' opinion it cannot be used as a statement by Karapayi under Section 32 (5) of the Evidence Act, as it was not made before the dispute as to the respondent's paternity arose. It is also obviously not admissible under Section 33, as it was not a statement given in evidence at the maintenance enquiry. Even on the basis of it having been admitted by consent, it can only, their Lordships think, be evidence that such a statement was made by Karapaya in 1915, and can have no possible relevance to the question of access in 1911.

The next document is a copy of the judgment of the District Magistrate in the same proceeding. He held on the evidence before him that the respondent was not the son of Karapaya. This document also has found its way on to the record, but it is clearly not binding upon the respondent, as was admitted in the District Court, and its relevance to what took place in 1911 is, to say the best of it, extremely remote

One other incident must be referred to which assumed considerable importance at the trial, and has been pressed by the appellants' Counsel before the Board.

Karapaya was certified a lunatic in 1920, and Chellaya applied to be appointed guardian of his person and property. To buy off the opposition of Karapayi it was arranged upon the advice of one Narayanar Chettiar that Rs. 5,000 out of Karapaya's estate should be given to her upon condition that she would admit that the respondent was the son of Nachiappa, with whom Karapaya had alleged in 1915 that she was living. She accepted the terms offered, and in pursuance of the arrangement was caused to purchase two houses in the joint names of herself and the respondent, who was described in the purchase deed as the son of Nachiappa. On the same day an application was made by her to be appointed guardian of the respondent, who was again described as the son of Nachiappa, and she was so appointed. Copies of all these documents were brought on the record at the trial, some pages of the cross-examination of Karapayi were devoted

to them, and the trial Judge evidently regarded them as of importance. It is sufficient to quote three sentences from his judgment :—

> " I have no doubt that Karapayi declared that the plaintiff was Nachiappa's son when she received Rs. 5,000. If the plaintiff is not the child got by her with Nachiappa I do not think she will declare as she had done. Under these circumstances, I am of opinion that the defendants have fairly proved that the plaintiff is not the deceased Karapaya's son."

How any of these statements by Karapayi could be used as evidence against the respondent, or, if allowed to be proved, how any possible weight could be attached to them, having regard to the circumstances under which they were made, their Lordships fail to understand. Only the guardianship application seems to have been referred to in the High Court, and as to it the learned Chief Justice records that Counsel for the present appellants " properly admitted that the contents of the petition were not admissible against the plaintiff as evidence of the truth of the statements therein contained." Their Lordships think that a similar concession might well have been made in the argument before them.

It is not necessary to refer in any detail to the deposition of Karapayi, or of the other witnesses who were called in support of the respondent's case. Their evidence may have been quite untrustworthy, and their Lordships are certainly not impressed with the veracity of the lady, but there is nothing to be extracted from their depositions which helps the appellants towards proof of non-access upon which the success or failure of their defence so intimately depends.

For these reasons their Lordships think that the conclusion come to by the High Court was right, that the appeal fails, and should be dismissed with costs. And they will humbly advise His Majesty accordingly.

In the Privy Council.

KARAPAYA SERVAI AND OTHERS

v.

MAYANDI.

DELIVERED BY SIR GEORGE LOWNDES.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1934.